

PERFECTION OF LEGAL BASIS IN ORGANIZED CRIME'S COMBATING IN UKRAINE. IS IT ENOUGH TO COMBAT ORGANIZED CRIME?

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*“Organized crime constitutes nothing less than
a guerrilla war against society”
(Lyndon B. Johnson)*

Abstract

The aim of the paper is to overview and analyze legal basis for combating organized crime in Ukraine, namely international and regional agreements (The Conventions and their additional protocols).

The novelty of the paper is the fact that this type of research has not been carried out in depth yet abroad with exceptions on some aspects in Ukraine. This will allow us to have clear picture on legal basis for combating organized crime in Ukraine from international point of view. At the same time it facilitates to get a clear and comprehensive answer for the following questions: is international and regional legal basis enough to combat successfully a public enemy? Does Ukraine have law on prevention organized crime?

Keywords: organized crime, international agreements, regional agreements, prevention, Ukraine.

Introduction

Researchers and representatives from law enforcement agencies, security services agreed in one voice that organized crime is one of the most serious threats to each country's national security. Namely the alleged ties between organized crime and terrorism, organized crime and cybercrimes and their implications to country's national security. Acknowledging that organized crime corrupts the system

and morals of a state, destabilizing the society and undermining public faith in the state, rule of law. So, it leads to the question – how to combat organized crime in vibrant and global world?

Despite a positive side of globalization on wellbeing of people, spreading news technologies, freedom of workers' movement, it brings also additional tasks for international community in combating organized crime. Ukraine is not exempted from it.

The Maidan's revolution of 2014 in Ukraine, invasion of Russia into territory of Ukraine and still ongoing war once more remind to us about threat of organized crime. Title III "Justice, Freedom and Security" of the European Union and Ukraine Association Agreement signed in 2014 highlights the commitment **to combating organised crime** and money laundering, to reducing the supply of and demand for illicit drugs and to stepping up cooperation in the fight against terrorism¹.

Object of research: the international legal tools for combating organized crime (hereinafter refer to as "OC") in Ukraine.

The objective of the paper to get answer on the main question of this research: are international and regional legal tools enough for combating OC.

To reach the mentioned objective, the following **tasks** have been set out:

To identify international (namely The United Nations) and regional namely (European Council) Conventions and their additional protocols directly and indirectly targeting OC;

To identify international (The United Nations) and regional namely (European Council) Conventions and their additional protocols signed and ratified by Ukraine;

To review international legal acts signed and ratified by Ukraine on the object of exemption done during ratification procedure at country's Parliament;

To review laws of Ukraine on prevention of OC and on detection of criminal offences committed by organized crime groups via operational and search activity (criminal intelligence).

Legislative framework

According to Paoli and Fijnaut, the term "**organized crime**" coined in the United States at the end of the nineteenth century.

The threat of organized crime to public safety mentioned in the papers of researchers, supranational court's case-law, for example, the Judgment of European Court on Human Rights (hereinafter refer to as The ECHR) in the case *Klass and other v. Germany* dated September 6th, 1978. The ECHR states in the paragraph 59 of mentioned case that *The Court agrees with the Commission that some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention (see, mutatis mutandis, the judgment of July 23rd, 1968 in the "Belgian Linguistic" case, Series A no. 6, p. 32, para. 5). As the Preamble to the Convention states, "Fundamental Freedoms ... are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which (the Contracting States) depend"*². *In the context of Article 8 (art. 8), this means that a balance must be sought between the exercise by the individual of the right guaranteed to him under paragraph 1 (art. 8-1) and the necessity under paragraph 2 (art. 8-2) to impose secret surveillance for the protection of the democratic society as a whole*³.

In Malone case the ECHR states, that the increase of crime, and particularly the growth of organized crime, the increasing sophistication of criminals and the ease and speed, with which they can move about have made telephone interception an indispensable tool in the investigation and prevention of serious crime.

The World Economic Forum (hereinafter, WEF) annually publishes Global Competitiveness Report, which looks at dozens of measures of economic and institutional health to compile a ranking of countries. One of the subcategories used by the WEF is the prevalence of organized crime – listed under the "security" index. Extortion, racketeering, theft, violence, and property damage are all factors that could hold back a country's development. WEB uses a scale of 0 to 10, where 0 is highly level of OC and 10 is no OC. According to organized crime index *Finland, Norway rank highest with scores 6.8 and 6.6. Ukraine scores 3.9 and 113 place in ranking amongst 137, Moldova 4.3 and 94 place, Russian Federation 4.5 and 86 place*⁴.

International community acknowledge the threat of organized crime in the whole world and takes step to combat this evil by adopting new body for cooperation between states for example

such as Interpol, by adopting new international legal acts. Some internationally signed acts are binding and some are not binding. The author of the paper analyzes only legally binding international treaties signed by Ukraine.

Part 1, article 9 of the Constitution of Ukraine states, that International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine⁵.

The author reviewed and selected international treaties targeting OC ratified by Ukraine. The following Conventions and their additional protocols had found:

- The United Nations Convention against Transnational Organized Crime (also called Palermo Convention) adopted by General Assembly resolution 55/25 of November 15th, 2000, is the main international instrument in the fight against transnational organized crime⁶;
- Palermo Convention entered into force on September 29th, 2003 and further supplemented by three Protocols, which target specific areas of organized crime;
- The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Ukraine ratified the protocol on May 21st, 2004);
- The Protocol against the Smuggling of Migrants by Land, Sea and Air (Ukraine ratified the protocol on May 21st, 2004).

The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition⁷ (Ukraine ratified the protocol on June 4th, 2013) Ukraine ratified Palermo Convention on May 21st, 2004 with declarations and reservations. For example, paragraph b of article 2: *The term “serious crime” corresponds to the terms “grave crime” and “especially grave crime” in the Ukrainian criminal law. Grave crime means the crime for which the law provides such type of punishment as imprisonment for at least five years and not exceeding ten years (paragraph 4 of Article 12 of the Criminal Code of Ukraine), and especially grave crime means crime for which the law provides such type of punishment as imprisonment for more than ten years or life imprisonment (paragraph 5 of Article 12 of the Criminal Code of Ukraine)*⁸.

- Single Convention on Drugs of 1961 was amended by protocol

of 1972 and it entered into force on September 27th, 2001 in Ukraine⁹. Yellow List – the list of drugs under international control;

- The Convention on Psychotropic Substances 1971. Ukraine ratified the Convention with reservations made upon signature and confirmed upon ratification. The Convention entered into force on November 20th, 1978 in Ukraine¹⁰. Green List – the list of Psychotropic Substances under International Control¹¹.
- The United Nations Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substances 1988. The Convention entered into force on August 28th, 1991 in Ukraine¹². The Convention established anti-money laundering provisions.
- International Convention for the Suppression of the Financing of Terrorism 1999. The Convention entered into force on December 6th, 2002¹³.

Other important international tools for combating organized crime are regional conventions adopted by European Council. Ukraine is active participant of mentioned international organization. **Regional conventions entered into force (signed and ratified by Ukraine) are:**

- European Convention on Extradition 1957.
- European Convention on Mutual Assistance in Criminal Matters 1959.
- European Convention on the Transfer of Proceedings in Criminal Matters 1972.
- Additional Protocol to the European Convention on Extradition 1975.
- Second Additional Protocol to the European Convention on Extradition 1978.
- European Convention on the Suppression of Terrorism 1977.
- Convention on the Transfer of Sentenced Persons 1983.
- Convention on Mutual Administrative Assistance in Tax Matters 1988.
- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990.
- Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations.
- Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1995.

- Additional Protocol to the Convention on the Transfer of Sentenced Persons 1997.
- Criminal Law Convention on Corruption 1999.
- Civil Law Convention on Corruption 1999.
- Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters 2001.
- Convention on Cybercrime 2001 (Budapest Convention).
- Additional Protocol to the Criminal Law Convention on Corruption 2003,
- Council of Europe Convention on the Prevention of Terrorism 2005.
- Council of Europe Convention on Action against Trafficking in Human Beings 2005.
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the
- Proceeds from Crime and on the Financing of Terrorism 2005.
- Third Additional Protocol to the European Convention on Extradition 2010.
- Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health 2011.
- Fourth Additional Protocol to the European Convention on Extradition 2012.

Sum – up, Ukraine signed and ratified the main international agreements (The Conventions and its additional protocols) directly or indirectly targeting organized crime.

All laws targeting organized crimes could relatively be divided into categories:

1) preventing (for example, On Operational and investigative activity);

2) detecting, investigating and prosecuting (for example, Criminal procedure code);

3) executing (for example, Penal code).

Crime reduction strategy in respect of “**organized crime**” should be one of law enforcement priorities. It could be implemented by organizational, legal means (laws, regulations). Alongside with many factors (for example, rate of unemployment), which affects crime index in the country, the author is going to focus only on legal part of organized crime reduction, firstly on prevention. Although it exists,

the difficulties of evaluating prevention in the many areas, in which data quality on crime levels and their organization are poor, but also gives examples (mainly financial crime) where private sector data quality is good enough to demonstrate effectiveness.

Ukraine lacks the law on organized crime prevention. Other countries have law/acts on prevention of organized crime. For example, The **Law On organized crime prevention** of the Republic of Lithuania¹⁴. Article 1 of the law mentioned above states that *the law prescribes the application of preventive measures in respect of a person who by his actions may restrict the rights and freedoms of other persons, creates conditions for the emergence and development of social and economic preconditions of organized crime, and poses a threat to public security*. Georgia has a similar law under name “**On Organized crime and Racketeering**”¹⁵. A well-known law on combating organized crime is **Racketeer Influenced and Corrupt Organizations Act** (hereinafter refer to as, “the RICO”) of 1970 in USA. The RICO is the part of the **Organized crime control Act** of USA¹⁶.

The Law of Ukraine “**On Operational and Search Activity**” (On operative investigative activity)¹⁷ is the main legal act, which aim is to detect criminal offences at early stages of commission or even to prevent it from occur. Covert investigative actions’ usage in investigation are granted by international treaties, which Ukraine signed and ratified and they are in force, case-law of European Court on Human Rights (for example, *Klass v. Germany 1978*).

Article 2 (i) The **United Nations Convention Against Transnational Organized Crime** declared that ***Controlled delivery**’ shall mean the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence*. Article 20 (1) *If permitted by the basic principles of its domestic legal system, each State Party shall, within its possibilities and under the conditions prescribed by its domestic law, take the necessary measures to allow for the appropriate use of **controlled delivery** and, where it deems appropriate, for the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, by its competent authorities in its territory*

for the purpose of effectively combating organized crime.

Article 20 (4) *Decisions to use **controlled delivery** at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods to continue intact or be removed or replaced in whole or in part*¹⁸.

The Law of Ukraine “On Operative and Search Activity” (1992) in article 8. Rights of units carrying out operative and search activity, states, that:

To perform the tasks of operative and search activity subject to existence of grounds provided for in Article 6 of this Law, operative units shall have the right to: (...)

2) *to perform **controlled supply and controlled and operational buy of goods**, items and substances, including those prohibited for circulation, from natural and legal persons irrespective of form of ownership in order to identify and document the facts unlawful acts. **Controlled supply, controlled and operational buy** shall be performed in accordance with the provisions of Article 271 of the Criminal Procedure Code of Ukraine (4651-17) in the manner prescribed by **regulatory** legal acts of the Ministry of Internal Affairs of Ukraine, the central executive body responsible for formulation and implementation of the state tax and customs policy, the Security Service of Ukraine, coordinated with the Prosecutor General’s Office of Ukraine and registered with the Ministry of Justice of Ukraine;*

7) *covertly identify and record traces of grave or especially grave crime, the documents and other items that can serve as evidence of preparation or commission of such crime, or receive intelligence information, including through penetration and inspection of publicly inaccessible places, housing or other property of a person under Article 267 of the Criminal Procedure Code of Ukraine (4651-17);*

7-1) *for the purpose of identifying and recording acts provided for in Articles 305, 307, 309, 311, 318, 321, 364-1, 365-2, 368, 368-3, 368-4, 369, 369-2 of the Criminal Code of Ukraine (2341-14), conduct operations of controlled committing relevant acts. The procedure for obtaining a permit, its validity period and the procedure for conducting an operation of controlled committing a corrupt act shall be defined by the Criminal Procedure Code of Ukraine (4651-17);*

8) *perform special task of disclosure of criminal activities of an*

organized group or criminal organization in accordance with the provisions of Article 272 of the Criminal Procedure Code Ukraine (4651-17);

9) carry out audio and video monitoring of a person, interception of data in transport telecommunication networks, electronic information networks in accordance with the provisions of Articles 260, 263-265 of the Criminal Procedure Code of Ukraine (4651-17);

10) impose arrest on correspondence, review it and seize in accordance with the provisions of Articles 261, 262 of the Criminal Procedure Code of Ukraine (4651-17);

11) carry out surveillance over the person, item or place, as well as audio and video monitoring of a place in accordance with the provisions of Articles 269, 270 of the Criminal Procedure Code of Ukraine (4651-17);

12) locate the radio-electronic means in accordance with the provisions of Article 268 of the Criminal Procedure Code of Ukraine (4651-17);

13) have overt and covert full-time and part-time employees;

14) use confidential cooperation in accordance with the provisions of Article 275 of the Criminal Procedure Code of Ukraine (4651-17);

15) receive information on crimes being prepared or committed and threat to security of society and the state from legal and natural persons free of charge or for a fee;

*Covert inspection of publicly inaccessible places, housing or other property of a person, audio and video monitoring of a person, audio and video monitoring of a place, surveillance over a person, interception of data in transport telecommunication networks, electronic information networks, imposition of arrest on correspondence, its review and seizure, locating the radio-electronic means shall be carried out on the basis of the investigating judge's ruling rendered at the request of the head of the relevant operative unit or his deputy, coordinated with the prosecutor. The above-mentioned measures shall **apply solely for the purpose of preventing** the commission of a grave or especially grave crime, preventing and suppressing acts of terrorism and other encroachments of special services of foreign states and organizations, where it is impossible to obtain information otherwise.*

Article 13. Procedure of using covert personnel

1. When combating organized crime, special units for combating organized crime of the Security Service of Ukraine have the right to engage, if other measures are insufficient to suppress organized crime and bring charges against culprits, on-staff and off-staff covert personnel to infiltrate them into criminal groups under cover. (Article 13 (1) as amended per Law No 193-VIII (193-19) of 12.02.2015)

2. Covert personnel may be infiltrated into organized criminal groups upon availability of information regarding organized criminal activity and on the basis of a written assignment

3. To perform the mission, a covert operative may enter into labor, civil law-regulated and other relationships under his/her cover. The damages or losses caused by actions of a covert operative on a mission are compensable from the state budget. A covert operative cannot be held liable for damages or losses caused by his/her actions, if these actions were necessary to accomplish the mission.

Article 14. Procedure of using members of organized criminal groups to combat organized crime

1. To combat organized crime, cooperation of members of organized criminal groups may be sought according to the procedure provided by the Law of Ukraine On Field Investigation (2135-12) and the Code of Criminal Procedure of Ukraine (4651-17)¹⁹.

Customs Code of Ukraine (2012), in its **Chapter 66. Anti-smuggling measures in article 456. Controlled delivery of drugs, psychotropic substances and precursors states**, that according to the laws of Ukraine, in order to identify the sources and channels of illicit trafficking in narcotic drugs, psychotropic substances and precursors, and persons engaged, the revenue and duties authorities together with other public authorities that have the right to perform operational search activities may use the method of controlled delivery of those drugs, substances and precursors.

2. Procedure for controlled delivery shall be determined by this Code and relevant regulation of the central executive authority responsible for formulating and implementing the state tax and customs policy, Ministry of Internal Affairs of Ukraine, Security Service of Ukraine, the central authority responsible for implementing the state border protection policy agreed upon with the Prosecutor General's Office of Ukraine and registered with the Ministry of Justice of Ukraine. (as amended by the Law of Ukraine No 405-VII of 04.07.2013)

Article 457. Movement of goods under secret control

1. To identify and hold liable the persons involved in smuggling, as well as to seize goods for which there is a suspicion of illegal movement across the customs border of Ukraine, such goods may be moved under secret control and operational supervision of the law enforcement agencies²⁰.

Conclusions

The Law of Ukraine “**On Operational and Search Activity**” (also under another name “On operative investigative activity”) can be partly considered as preventive law.

Proactive investigative methods have become increasingly important. This shift caused by the rise of organized crime and increasing concerns about terrorism, cybercrime. Other particular laws can play a preventive role, mostly targeting the most profitable sources of illegal incomes for organized crime if they are used in a proper way and supported by the state through a transparent financing. For example, **The Law of Ukraine “On Thwarting Human Trafficking”.**

So, legal framework of Ukraine contains enough covert investigative actions for **combating organized crime.**

Ukraine signed and ratified the main international agreements (The Conventions and their additional protocols) directly or indirectly targeting organized crime and their entering into force in Ukraine.

Ukraine lacks the law on organized crime prevention.

References

- ¹ EU-UA Association Agreement. http://eeas.europa.eu/archives/docs/top_stories/pdf/150625-quick-guide-to-the-eu-ua-association-agreement.pdf
- ² ECHR judgement *Klass and other v. Germany*. [https://hudoc.echr.coe.int/eng#{"itemid":\["001-57510"\]}](https://hudoc.echr.coe.int/eng#{)
- ³ Human rights files No 15, p. 32. [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15\(1997\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15(1997).pdf)
- ⁴ Organized crime. <http://reports.weforum.org/global-competitiveness-index-2017-2018/competitiveness-rankings/#series=EOSQ035>
- ⁵ The Constitution of Ukraine. <https://rm.coe.int/constitution-of-ukraine/168071f58b>
- ⁶ United Nations Convention against Transnational Organized Crime. <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

- ⁷ The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition. https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-c&chapter=18&clang=_en
- ⁸ United Nations Convention against Transnational Organized Crime. https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en#EndDec
- ⁹ Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-18&chapter=6&clang=_en
- ¹⁰ Convention on psychotropic substances. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-16&chapter=6&clang=_en#EndDec
- ¹¹ All information on Narcotic drugs and psychotropic substances under international control are at the website of International Narcotics Control Board: <https://www.incb.org>
- ¹² United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&clang=_en#9
- ¹³ International Convention for the Suppression of the Financing of Terrorism. https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-11&chapter=18&lang=en
- ¹⁴ The Law on organized crime prevention of the Republic of Lithuania.
- ¹⁵ The law of Georgia on combating organized crime and racketeering. <https://matsne.gov.ge/ru/document/download/27814/0/en/pdf>
- ¹⁶ Organized crime control act of 1970 (USA). Kelly, Robert J.; Chin, Ko-lin; Schatzberg, Rufus. Handbook of Organized Crime in the United States. Santa Barbara, Calif.: Greenwood Publishing Group, 1994.
- ¹⁷ Law of Ukraine On Operative and Search Activity (1992). <https://zakon.rada.gov.ua/rada/show/en/2135-12>
- ¹⁸ United Nations Convention against Transnational Organized Crime. <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>
- ¹⁹ Law of Ukraine On Operative and Search Activity (1992). <https://zakon.rada.gov.ua/rada/show/en/2135-12>
- ²⁰ Customs Code of Ukraine. <http://sfs.gov.ua/data/files/10977.pdf>

Anotācija

Rakstā analizēts normatīvais regulējums, kas paredzēts efektīvai organizētās noziedzības ierobežošanai Ukrainā. Tie ir Ukrainas likumdošanas aktos ieviestie starptautiskie un reģionālie tiesību akti, konvencijas un to pielikumi. Rakstā paustās atziņas ļauj novērtēt ieviestos pasākumus, kā arī atzīmēt vēl paveicamo normatīvā regulējuma pilnveidei. Ievērojot organizētās noziedzības pieaugumu un aizvien pieaugošās bažas par terorismu, kibernoziegumiem, īpaši akcentēta proaktīvo metožu nozīme.

Nozīmīgi ir arī preventīvie likumi, kas galvenokārt, vērsti uz nelegālu ienākuma avotu ierobežošanu un finanšu plūsmu kontroli. Tomēr organizētās noziedzības novēršanas regulējums būtu pilnveidojams.